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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 347494

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In the Matter of the Estate of
MARY TERESA MAIURI,
Deceased.

REPLY BRIEF OF APPELLANTS,
Jay A. Maiuri and Marcus M. Maiuri

Michael E. de Grasse
Counsel for Appellants
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Receipt of Michael Maiuri dated April 8, 2003, purporting to show receipt of his share of the Charles Maiuri estate (petitioners' exhibit 11 at trial, also, Michael Maiuri deposition exhibit 11)

Receipt of Robert Maiuri dated April 9, 2003, purporting to show receipt of his share of the Charles Maiuri estate (petitioners' exhibit 12 at trial, also, Michael Maiuri deposition exhibit 12)

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INTRODUCTION

The respondent has imaginatively reformulated the trial court decision in aid of his efforts to affirm the decision below. Axiomatically, this Court reviews the decision actually made by the trial court, not the decision that the respondent wishes the trial court made. Contrary to the respondent's assertion (Respondent's brief at 15), the administration of the Mary Teresa Maiuri estate was not completed with a *non-pro rata* distribution. No substantial evidence supports a finding or a conclusion that a *non-pro rata* distribution ever occurred. Counterfactual analysis has no place here.

The decision that was actually made by the trial court fails tests of law, logic and fact. The decision "reclosing" the estate was contrary to established authority. The trial court's reopening the estate to discover maladministration only to "reclose" the estate without rectifying the respondent's patent breach of his fiduciary obligations defies logic. As a matter of fact, there is no evidentiary

support for the respondent's position that he properly completed the administration of the estate with a *non-pro rata* distribution. Therefore, the trial court should be reversed.

ARGUMENT IN REPLY

I. THE TRIAL COURT'S RULING THAT THE PETITIONERS WERE TOO LATE TO ATTACK A VOID DECLARATION OF COMPLETION OF PROBATE SHOULD NOT BE GIVEN A SOFT TOUCH REVIEW FOR ABUSE OF DISCRETION.

A. Well established authority shows that a trial court must vacate a void declaration of completion of probate whenever it is challenged pursuant to CR 60(b); the trial court has no discretion.

Dissenting in *Kennedy v. Sundown Speed Marine, Inc.*, 97 Wn.2nd 544, 550, 647 P.2nd 30 (1982), Justice Utter quoted the "preeminent commentators" C. Wright and A. Miller on the trial court's duty when faced with a void judgment:

There is no question on the part of the court
....Either a judgment is void or it is valid.
Determining which it is may well present
a difficult question, but when that question

is resolved, the court must act accordingly.
Kennedy, supra, 11 C. Wright & A. Miller,
Federal Practice § 2862, at 197 (1973).

Where, as here, the declaration of completion of probate is void, as the trial court found and concluded (CP 64:15-17), it must be set aside. *Pitzer v. Union Bank of Calif.*, 141 Wn.2nd 539,551, 9 P.3rd 805 (2000).

The trial court's *sua sponte* reversal of its own decision properly vacating a void declaration of completion of probate is erroneous and should be reversed. A trial court has no discretion except to set aside a void declaration of completion of probate. Time limits applicable to motions under CR 60(b) do not apply to attacks on void judgments. *In re Marriage of Leslie*, 112 Wn.2nd 612,620, 772 P.2nd 1013 (1989); *Scott v. Goldman*, 82 Wn.App. 1,6, 917 P.2nd 131, *review denied*, 130 Wn.2nd 1004 (1996).

B. The case cited by the respondent should not be applied to defeat the petitioners' attack on the void declaration of completion of probate.

Kennedy, supra, does not depart from the foregoing analysis. It should be noted that *Kennedy* involved a default judgment, not a void judgment. More important, the remark by Justice Dolliver in his opinion concerning a trial court's discretion under CR 60(b) was joined by only two justices. Three other justices concurred in the result, but agreed with Justice Utter's dissent concerning a trial court's lack of discretion in dealing with a void judgment. The use of *Kennedy* is governed by the rule set forth in *Davidson v. Hensen*, 135 Wn.2nd 112,128, 954 P.2nd 1327 (1998):

Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds.

Reading *Kennedy, supra*, in light of the foregoing principle, shows that the opinion of Justice Dolliver avails the respondent nothing.

**II. THE RESPONDENT'S IMAGINATIVE
REFORMULATION OF THE TRIAL
COURT'S DECISION FAILS IN THE FACE
OF EVIDENCE PROVING THAT THE WILL
OF MARY TERESA MAURI WAS
THWARTED TO THE BENEFIT OF THE
RESPONDENT AND THE DETRIMENT OF
THE PETITIONERS.**

Examining the decision below shows that it must be reversed as contrary to law, logic and fact. Legal deficiencies in the respondent's position abound. As explained in the foregoing section of this brief, the trial court had no discretion but to set aside the declaration of completion of probate as void. Initially and correctly, that declaration of completion of probate was set aside because it was void, and, apparently, the result of extrinsic fraud. (CP 64:12-17; CP 65:15-16) Thus, the parties and the trial court were in a position to fulfill and execute the will of Mary Teresa Maiuri as written.

Perhaps in a triumph of hope over experience, and, contrary to the petitioners' request (CP 37:18-21; CP 40:21), the trial

court named the respondent Michael Maiuri as personal representative. (CP 64:20-25) This appointment was erroneous as Michael Maiuri had been recreant to his trust. He had failed to provide notices to Jay and Marcus. He had transferred real property to himself in contravention of Mary Teresa Maiuri's will. Little should have been expected from the respondent who is described by the trial court as "not sophisticated and to some extent is not even literate." (CP 201, paragraph 15) Moreover, the respondent Michael Maiuri never accounted for his actions as co-personal representative, contrary to the trial court's order. (CP 65:21-24) Notwithstanding incontrovertible proof that Mary Teresa Maiuri's will had been thwarted, no remedy was allowed. The trial court concluded:

The rather obvious mistakes in the handling of this Estate were not the result of extrinsic fraud but were rather the result of ignorance on the part of the co-personal representatives combined with overreliance on their attorney to fulfill their duties and to give effect to their mother's directions set forth in her Last Will and Testament. (CP 201-202, paragraph 2)

Thus, the estate was "reclosed."

Faced with his failure to execute Mary Teresa Maiuri's will as written, the respondent contends that "the evidence shows" a *non-pro rata* distribution. (Respondent's brief at 15) In fact, the evidence does not show a *non-pro rata* distribution. Rather, in counsel's own words (offered in denial of the petitioners' position), the idea of a *non-pro rata* distribution is "the fanciful manufacture of counsel." (Respondent's brief at 15)

Only two questions need be asked about a *non-pro rata* distribution in this case: when did it happen? how did it happen?

The declaration of completion of probate was filed by the respondent and his co-personal representative on October 29, 1996. At that time nothing was distributed to Jay or Marcus. Everything was distributed to Michael, Robert and Charles, according to receipts. (Ex. 5, 6, 7) Later, receipts signed by Jay and Marcus were obtained. These receipts are dated April 10 and 11, 2003, respectively. (Ex. 8, 9) These receipts purport to show that Jay and Marcus received their share of the Mary

Teresa Maiuri estate. Mary Teresa Maiuri's will created a trust for the benefit of Charles, with Michael, Robert, Jay and Marcus as residuary beneficiaries. Clearly, upon the death of Charles, Jay and Marcus should have, at a minimum, received real property that should have been held in trust for the benefit of Charles. (CP 6-7) While receipts show a distribution from the estate of Charles to Michael and Robert, nothing was distributed to Jay and Marcus. Therefore, the answer to the question "when did the *non-pro rata* distribution happen,?" is "never."

Nothing in the record shows how a *non-pro rata* distribution could have happened. There is no accounting indicating a *non-pro rata* distribution. The respondent, himself, never described a *non-pro rata* distribution. The trial court found no *non-pro rata* distribution. Therefore, the *non-pro rata* distribution is nothing more than an assertion by the respondent's counsel.

Finally, the respondent seized on the doctrine of waiver:

In 2003 they think they were not treated appropriately, consulted an attorney, and then did nothing for over a decade. This is evidence that they waived their rights....
(Respondent's brief at 14)

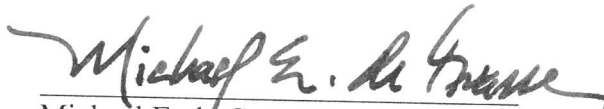
As stated in the petitioner's opening brief, the respondent has the burden of proving waiver. *Fulle v. Boulevard Excavating*, 20 Wn.App. 741,744, 582 P.2nd 566 (1978), *review denied*, 91 Wn.2nd 1018 (1979). Waiver must be proven through "unequivocal acts or conduct showing an intent to waive." *Mid-Town Partnership v. Preston*, 69 Wn.App. 227, 233, 848 P.2nd 1268 (1993). The record below is bereft of proof of waiver by Jay or Marcus. The trial court did not so find. There has been no cross appeal. Therefore, the contention that either Jay or Marcus waived their rights under the will of Mary Teresa Maiuri must be rejected.

CONCLUSION

On the basis of the foregoing argument, together with that set forth in the appellants' opening brief, the trial court should be reversed. This case should be remanded to the trial court with instructions to rectify the maladministration of the Mary Teresa Maiuri estate. The appellants, Jay A. Maiuri and Marcus M. Maiuri, should be awarded their attorney fees and expenses.

Dated this 2nd day of May, 2017.

Respectfully submitted,

A handwritten signature in cursive script, reading "Michael E. de Grasse".

Michael E. de Grasse WSBA #5593
Counsel for Appellants

APPENDIX OF REPLY BRIEF OF APPELLANTS

**Receipt of Robert Maiuri dated November 21, 1996,
purporting to show
receipt of his share of the Mary Teresa Maiuri estate
(petitioners' exhibit 5 at trial, also, Michael Maiuri deposition
exhibit 5)**

Nov 22

BY Quinn

SUPERIOR COURT OF WASHINGTON - WALLA WALLA COUNTY

In the Matter of the Estate)
of) No. 95 4 00208 9
MARY TERESA MAIURI,) RECEIPT
Deceased.)

The undersigned hereby acknowledges receipt of his full distribution share of the above entitled estate.

DATED this 21 day of November, 1996.

Robert M Maiuri
ROBERT MAIURI

EXHIBIT 5
WIT: M. Maiuri
DATE: 1-15-16
Deborah Richman, CCR

APPENDIX OF REPLY BRIEF OF APPELLANTS

**Receipt of Mike Maiuri dated November 22, 1996,
purporting to show
receipt of his share of the Mary Teresa Maiuri estate
(petitioners' exhibit 6 at trial, also, Michael Maiuri deposition
exhibit 6)**

FILED
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BY [Signature]

SUPERIOR COURT OF WASHINGTON - WALLA WALLA COUNTY

In the Matter of the Estate)
of) No. 95 4 00208 9
MARY TERESA MAIURI,)
Deceased.)
-----)

The undersigned hereby acknowledges receipt of his
full distribution share of the above entitled estate.

DATED this 22 day of November, 1996.

[Signature: Mike Maiuri]
MIKE MAIURI

EXHIBIT 6
WIT: M. Maiuri
DATE: 1-15-16
Deborah Richman, CCR

ROACH & MONAHAN
ATTORNEYS AT LAW
11 SOUTH SECOND AVENUE
POST OFFICE BOX 1815
WALLA WALLA, WASHINGTON 99362-0034
(509) 529-5700

APPENDIX OF REPLY BRIEF OF APPELLANTS

**Receipt of Charles Maiuri dated November 22, 1996,
purporting to show
receipt of his share of the Mary Teresa Maiuri estate
(petitioners' exhibit 7 at trial, also, Michael Maiuri deposition
exhibit 7)**

FILED
KATHY MARTIN
CLERK

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BY [Signature]

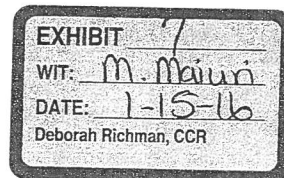
SUPERIOR COURT OF WASHINGTON - WALLA WALLA COUNTY

In the Matter of the Estate)
of) No. 95 4 00208 9
MARY TERESA MAIURI,)
Deceased.)
-----)

The undersigned hereby acknowledges receipt of his full distribution share of the above entitled estate.

DATED this 22 day of November, 1996.

16-25 M. Maiuri
CHARLES MAIURI



ROACH & MONAHAN
ATTORNEYS AT LAW
11 SOUTH SECOND AVENUE
POST OFFICE BOX 1815
WALLA WALLA, WASHINGTON 99362-0034
(509) 529-5700

APPENDIX OF REPLY BRIEF OF APPELLANTS

**Receipt of Jay Maiuri dated April 10, 2003,
purporting to show
receipt of his share of the Mary Teresa Maiuri estate
(petitioners' exhibit 8 at trial, also, Michael Maiuri deposition
exhibit 8)**

FILED
KATHY MARTIN
COUNTY CLERK

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WALLA WALLA COUNTY
WASHINGTON

SUPERIOR COURT OF WASHINGTON WALLA WALLA COUNTY

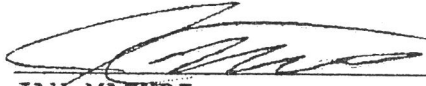
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of)
MARY TERESA MAIURI,)
Deceased.)
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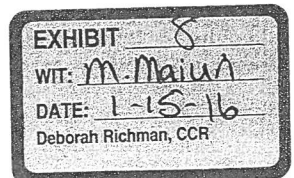
No. 95 4 00208 9

RECEIPT

The undersigned hereby acknowledges receipt of his
full distributive share of the above entitled estate.

DATED this 10th day of April, 2003.


JAY MAIURI



ROACH & MONAHAN

ATTORNEYS AT LAW

27 1/2 WEST MAIN

POST OFFICE BOX 1815

WALLA WALLA, WASHINGTON 99362-0034

(509) 529-5700

APPENDIX OF REPLY BRIEF OF APPELLANTS

**Receipt of Marc Maiuri dated April 11, 2003,
purporting to show
receipt of his share of the Mary Teresa Maiuri estate
(petitioners' exhibit 9 at trial, also, Michael Maiuri deposition
exhibit 9)**

FILED
KATHY MARTIN
COUNTY CLERK

2003 APR 17 P 3:27

WALLA WALLA COUNTY
WASHINGTON

SUPERIOR COURT OF WASHINGTON WALLA WALLA COUNTY

In the Matter of the Estate)

of)

MARY TERESA MAIURI,)

Deceased.)

No. 95 4 00208 9

RECEIPT

The undersigned hereby acknowledges receipt of his full distributive share of the above entitled estate.

DATED this 11 day of April, 2003.

Marc Maiuri
MARC MAIURI



ROACH & MONAHAN

ATTORNEYS AT LAW

27 1/2 WEST MAIN

POST OFFICE BOX 1815

WALLA WALLA, WASHINGTON 99362-0034

(509) 529-5700

APPENDIX OF REPLY BRIEF OF APPELLANTS

**Receipt of Robert Maiuri dated April 9, 2003,
purporting to show
receipt of his share of the Mary Teresa Maiuri estate**

**(petitioners' exhibit 10 at trial, also, Michael Maiuri deposition
exhibit 10)**

FILED
KATHY MARTIN
COUNTY CLERK

2003 APR 17 P 3:27

WALLA WALLA COUNTY
WASHINGTON

SUPERIOR COURT OF WASHINGTON - WALLA WALLA COUNTY

In the Matter of the Estate)
of)
MARY TERESA MAIURI,)
Deceased.)

No. 95 4 00208 9

RECEIPT

The undersigned hereby acknowledges receipt of his
full distributive share of the above entitled estate.

DATED this 9th day of April, 2003.

Robert Maiuri
ROBERT MAIURI



ROACH & MONAHAN

ATTORNEYS AT LAW

27 1/2 WEST MAIN

POST OFFICE BOX 1815

WALLA WALLA, WASHINGTON 99362-0034

(509) 529-5700

APPENDIX OF REPLY BRIEF OF APPELLANTS

**Receipt of Michael Maiuri dated April 8, 2003,
purporting to show
receipt of his share of the Charles Maiuri estate**

**(petitioners' exhibit 11 at trial, also, Michael Maiuri deposition
exhibit 11)**

APPENDIX OF REPLY BRIEF OF APPELLANTS

**Receipt of Robert Maiuri dated April 9, 2003,
purporting to show
receipt of his share of the Charles Maiuri estate**

**(petitioners' exhibit 12 at trial, also, Michael Maiuri deposition
exhibit 12)**

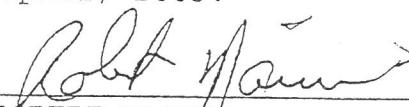
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SUPERIOR COURT OF WASHINGTON - WALLA WALLA COUNTY

In the Matter of the Estate)
of)
CHARLES MAIURI,) RECEIPT
Deceased.)

The undersigned hereby acknowledges receipt of his full distributive share of the trust created by the Last Will and Testament of Mary Maiuri and the estate of Charles Maiuri.

DATED this 9th day of April, 2003.


ROBERT MAIURI

